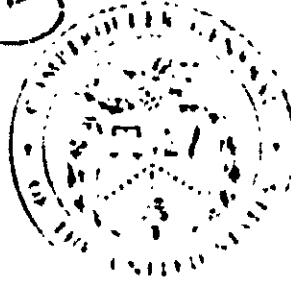


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DECISION



161K
THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

PL-2
McConnell

FILE: B-205323

DATE: April 27, 1982

MATTER OF: Idealspaten, GmbH

DIGEST:

1. No legal authority exists to extend a Department of Defense (DOD) Memorandum of Understanding with West Germany, waiving buy-national laws, to General Services Administration (GSA) purchases of intrenching tools which DOD requisitions from GSA, where GSA is purchasing the tools with its own appropriations and the Memorandum conflicts with an express statutory restriction on the use of GSA's appropriations.
2. Congress has granted the Secretary of Defense broad discretion to waive the Buy American Act through Memoranda of Understanding. The fact that the Secretary has assigned certain purchasing responsibilities to the General Services Administration (GSA) which effectively exempts GSA-purchased items from the application of a particular memorandum, is not in itself evidence that the Secretary has abused his discretion.

Idealspaten, GmbH, a West German firm, protests the application of a Buy American evaluation factor to its bid under solicitation No. FPN-FU-A0074-A-10-19-81, issued by the National Tools Center, General Services Administration (GSA), for intrenching tools. Idealspaten argues that a Department of Defense (DOD) Memorandum of Understanding (MOU) waiving buy-national laws in the purchase of defense equipment from the Federal Republic of Germany applied to this procurement, so that the Buy American evaluation factor should not have been added to the firm's bid. Idealspaten also asserts that DOD's assignment of the responsibility for purchasing the tool to GSA is an improper attempt to circumvent the MOU.

We deny the protest.

The intrenching tools are for GSA's stores-stock program. Under the program, GSA purchases the tools as well as other items for other agencies with its own funds. The major purchaser of intrenching tools from GSA apparently is DOD, which requisitions the tools according to a DOD/GSA "assignment agreement." See Defense Acquisition Regulation (DAR) §§ 5-1201 and 5-1201.8 (DPC 76-7, April 29, 1977).

Idealspaten was the apparent low bidder under GSA's solicitation. The firm was displaced after bid evaluation, however, according to the solicitation's Buy American clause under which 50 percent of the bid of a supplier offering a foreign-made product was added to that supplier's bid. The MOU which Idealspaten believes applies here exempts DOD's purchase of defense equipment manufactured in West Germany from buy-national laws. See DAR §§ 6-001.5(c), 6-104.4, and 6-1406.5, Article 1.8 (DAC 76-25, October 31, 1980). The MOU reflects the authority given the Secretary of Defense by the Congress in 1976 to achieve the standardization and interoperability of North Atlantic Treaty Organization equipment.¹ Idealspaten argues that the MOU applies because GSA is acting merely as an agent of DOD. Idealspaten asserts that the overwhelming majority of requisitions to GSA for the tool will be from DOD.

The solicitation's Buy American clause was a restatement of a provision in a 1979 GSA appropriations statute, extended through later legislation,² which provided:

¹ Act of July 14, 1976, Pub. L. No. 94-361, § 802, 90 Stat. 930.

² Idealspaten asks that we verify the legislative extension of the 1979 provision. The restrictive language of the 1979 statute reappears in Section 506 of the Treasury, Postal Service and General Government Appropriations Act of 1981, House Resolution 7583, August 20, 1980; and in Section 505 of the Treasury, Postal Service and General Government Appropriations Act of 1982, House Resolution 4121, July 30, 1981. Congress incorporated the restriction in the following: Act of October 1, 1980, Pub. L. No. 96-369, 94 Stat. 1351; Act of December 16, 1980, Pub. L. No. 96-536, 94 Stat. 3166; Act of June 5, 1981, Pub. L. No. 97-12, 95 Stat. 95; Act of October 1, 1981, Pub. L. No. 97-51, 95 Stat. 958; and Act of November 23, 1981, Pub. L. No. 97-85, 95 Stat. 1098.

"No part of any appropriation contained in this Act shall be available for the procurement of * * * any hand or measuring tool(s) not produced in the United States * * * except in accordance with procedures prescribed by section 6-104.4(b) of Armed Services Procurement Regulation * * *," Act of September 29, 1979, Pub. L. No. 96-74, § 505, 93 Stat. 573.

Section 6-104.4(b) of the Armed Services Procurement Regulation, now DAR, establishes the 50 percent price evaluation factor under authority of the Buy American Act, 41 U.S.C. § 10a-d (1976). We believe that GSA was constrained by its appropriations restriction to apply the Buy American Act evaluation factor to the protester's bid.

We considered a situation similar to this one in our decisions Procurement of Stainless Steel Flatware, B-186422, October 26, 1976, 76-2 CPD 364, and Royal Silver Manufacturing Company, Inc., B-186422, June 13, 1977, 77-1 CPD 421. There, DOD was subject, pursuant to an express appropriations provision, to a greater Buy American restriction in the purchase of silver flatware than was GSA, which sought to buy flatware with its own appropriations for its stores-stock program. We held that application of DOD's restriction was limited to DOD requisitions of the flatware from GSA, and that the expenditure of GSA appropriations warranted the application of GSA's own procurement procedures and constraints. Thus, even though DOD was the major purchaser of flatware from GSA stores, we determined that no legal basis existed upon which to extend DOD's appropriations restriction to GSA's purchase of the flatware with its own appropriations. See also 48 Comp. Gen. 403 (1968).

Similar reasoning applies here. While direct DOD purchases may be subject to the MOU in issue, the purchase here obligated GSA's own appropriations and GSA thus was required to comply with the express statutory restriction in those appropriations. That is, GSA could not buy a foreign-made "hand or measuring" tool except after applying a 50 percent evaluation factor during bid evaluation.

Idealspaton complains that DOD is circumventing the MOU by assigning the responsibility for purchasing the tool to GSA. The MOU, however, reflects the exercise of the broad discretion granted the Secretary of Defense by the Congress to waive the Buy American Act where he deems it appropriate. DOD's own regulations state that compliance with the Buy

American Act is GSA's responsibility where DOD is going to requisition items from the GSA stores-stock program, as is the case here, DAR § 6-102.3 (DAC 76-25, October 31, 1980). We believe that these regulations clearly reflect that the Secretary of Defense has determined not to give effect to the MOU for the purchase of stores-stock items such as intrenching tools. The facts of this case provide no basis to suggest that the Secretary has abused the broad discretion given him by the Congress in that respect.

Thus, GSA properly applied the Buy American evaluation factor to Idealspaten's bid. The protest is denied.

Milton J. Ascolan
for Comptroller General
of the United States